STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY A. PEABODY, Plaintiff-Appellant,	UNPUBLISHED May 12, 2005
v	No. 260469 Bay Circuit Court
WESTFIELD INSURANCE COMPANY, Defendant-Appellee.	LC No. 02-003908-NF

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq*., the circuit court held that plaintiff was not entitled to benefits predating the year prior to filing the complaint, denied plaintiff's motion to amend her complaint to add a legal malpractice claim and additional defendants, and granted defendant's motion in limine to preclude plaintiff from presenting evidence at trial regarding a claim for accommodations. Thereafter, the parties stipulated to dismiss defendant's counterclaim, and the court then dismissed the action since "no justiciable issues remain[ed]." Plaintiff appeals as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On October 20, 1984, plaintiff became a paraplegic after sustaining a spinal cord injury in an automobile accident. She was discharged from Mary Freebed Hospital, a rehabilitation facility, on February 20, 1985. Upon discharge, she needed assistance with daily living, including assistance with her bowel and bladder program.

From the time of her discharge from the hospital, February 20, 1985, until October 27, 1987, plaintiff's claims for nursing and attendant care expenses were treated as and commingled with her claims for replacement services; the claims were paid at the $20.00 per day rate for replacement services set by MCL 500.3107(1)(c). At the end of the three years following the accident, defendant's adjuster sent plaintiff a letter stating that replacement services would no longer be paid, but medical benefits would continue. Plaintiff asserts that this impliedly represented to plaintiff that she could no longer submit the nursing and attendant care claims, which had been treated as replacement services claims. According to plaintiff, neither her attorney nor the adjuster ever advised her that nursing and attendant care services constituted "reasonably necessary services" for plaintiff's care that would be covered, without the $20.00 per day cap or the three-year limitation, under MCL 500.3107(1)(a)

The one-year back rule, MCL 500.3145(1), provides in pertinent part:

> . . . If [a] notice [of injury] has been given or a payment [of personal protection insurance benefits for the injury] has been made, [an action for recovery of personal protection insurance benefits] may be commenced at any time *within 1 year after the most recent allowable expense . . . has been incurred*. However, the claimant *may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced*. [Emphasis added].

Plaintiff first claims that the circuit court erred in applying this rule to deny nursing and attendant care benefits from the date of her discharge from the hospital, February 20, 1985, until October 16, 2001, one year prior to the filing of this lawsuit. She asserts that a question of fact was presented regarding the adjuster's intent to defraud, and that therefore, defendant should be equitably estopped from relying on the statute of limitations.

In *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999), the Court stated:

> Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.

The *Conagra* Court further held that silence applies only where "the silent party had a duty or obligation to speak or take action." *Id.* at 141. Where a party does speak but misrepresents, the misrepresentation must be intentional. In *Robinson v Associated Truck Lines, Inc*, 135 Mich App 571, 573-574; 355 NW2d 282 (1984), vacated in part 422 Mich 946 (1985), the plaintiffs, who were injured in automobile accidents while working, brought suit against their self-insured employer for no-fault benefits more than a year after their injuries. The plaintiffs asserted that the defendant should have been estopped from relying on the statute of limitations because the defendant's employee, who handled both worker's compensation claims and no-fault claims, had told them that they were only entitled to worker's compensation benefits. *Id.* at 574-575. At the time he said so, the law was confused on this point; an entitlement to both was later established in *Mathis v Interstate Motor Freight System*, 408 Mich 164; 289 NW2d 708 (1980). The *Robinson* Court stated:

> A plaintiff who relies upon an estoppel theory to avoid a statute of limitations defense must allege actions by defendant such as concealment of a cause of action, misrepresentation as to the statutory time in which an action may be brought, or inducement not to bring the action. The "concealment" or "misrepresentation" alleged by plaintiffs in this case is that [defendant's employee] failed to inform plaintiffs that, after 1977, the law was confused as to whether workers' compensation was their sole remedy. We decline to hold that [he] was concealing or misrepresenting the law in so doing. As this Court noted in *Keller v Losinski*, 92 Mich App 468, 472; 285 NW2d 334 (1979):

> "Nor does this Court believe that the requirements of the doctrine of equitable estoppel are met in the present action. *(The insurer) did not intentionally misinform plaintiff and then seek to deny the information it had given to plaintiff. Rather, (the insurer) accurately stated to plaintiff the position which it continues to advance. There is nothing for the Court to estop (the insurer) from denying.*" [*Robinson, supra* at 576 (emphasis added, citation omitted).]

See also *Bromley v Citizens Ins Co of America*, 113 Mich App 131, 136; 317 NW2d 318 (1982) (intentionally misleading the plaintiff is a necessary prerequisite for application of equitable estoppel); *English v Home Ins Co*, 112 Mich App 468, 474-475; 316 NW2d 463 (1982) (remanded for consideration of equitable estoppel claim where the plaintiff alleged "deliberate" inducement not to sue).

Defendant's adjuster treated nursing and attendant care services as replacement services for the first three years, and told plaintiff that coverage for replacement services would end after three years, whereas medical benefits would continue. In response to defendant's motion for summary disposition, plaintiff presented no evidence that the adjuster intentionally misled her, and no evidence from which a reasonable inference to this effect could be drawn.[1] We conclude that the circuit court correctly held that equitable estoppel to assert the one-year back rule did not apply.

Plaintiff asserts that there was nonetheless a constructive fraud--a breach of an equitable or legal duty--and that constructive fraud can also toll the statute of limitations. She cites *Harts v Farmers Ins Exchange*, 461 Mich 1; 597 NW2d 47 (1999), for the proposition that a duty can be imposed on an "insurance agent or representative" where they misrepresent the nature or extent of coverage afforded or provided. However, *Harts* dealt with an insurance agent only, not an insurance adjuster, and this is distinguishable.

Plaintiff also mistakenly states that in *Huhtala v Travelers Ins Co*, 401 Mich 118; 257 NW2d 640 (1977), the Court held that an unequivocal promise is not required to establish equitable estoppel so long as there is conduct inducing action of a definite and substantial character. The *Huhtala* Court was discussing promissory estoppel; thus, this case is inapplicable. *Id*. at 133-134.

Next, plaintiff next argues that the circuit court erred in denying her motion to amend her complaint to add a legal malpractice claim and an additional defendant. The circuit court noted that this would be a second amended complaint, that legal malpractice and the one-year back rule did not involve a common question of law, and that since the claim was being dismissed against defendant, there was no longer a common question of fact. Although not the basis for the ruling, the circuit court also noted that venue against the attorney would be in a different county. The

---

[1] We reject plaintiff's claim that a letter from the adjuster to her claims manager seeking guidance on whether to pay a claim for surgery necessitated by use of the wheelchair, but not directly arising out of the accident, establishes an intent to mislead.

issue in the malpractice action would be whether the attorney breached the standard of care by failing to advise plaintiff that she was entitled to all of her nursing and attendant care expenses and that coverage for these expenses did not end when coverage for replacement services ended. Although tangentially related to whether plaintiff was entitled to back benefits from the carrier, there was no abuse of discretion in declining to allow the amendment two years into the litigation once all claims against the existing defendant were being dismissed. *Doyle v Hutzel Hosp,* 241 Mich App 206, 211-212; 615 NW2d 759 (2000).

Finally, plaintiff argues that the circuit court erred in granting defendant's motion in limine regarding an accommodations claim for room and board. Plaintiff asserts that it was pleaded in the complaint because she sought all damages available under the no-fault act. The court stated that this new theory was asserted two years into the litigation, that it would delay adjudication of the existing claim because a new case evaluation would be required, that no statute of limitations issue would preclude the filing of a new suit to assert this claim, and that if allowed the case would not likely be resolved until 2006. Where a new theory comes to light so late in the litigation that it would require a new case evaluation and presumably a reopening of discovery, and there is no impediment to bringing the theory in a new action, there is no abuse of discretion in barring evidence pertaining to the theory.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski